

PETA LEWIS HALLISEY, SBN: 114501  
BRANTON & WILSON, APC  
701 B Street, Ste 1255  
San Diego, California 92101  
619.236.1891 (phone)  
619.236.8005 (fax)  
[plhallisey@brantonwilson.com](mailto:plhallisey@brantonwilson.com)

STEPHEN L. SCHREINER, SBN: 112802  
SOLOMON WARD SEIDENWURM & SMITH LLP  
401 B Street, Suite 1200  
San Diego, California 92101  
619.231.0303 (phone)  
619.231.4755  
[sschreiner@swsslaw.com](mailto:sschreiner@swsslaw.com)

Attorneys for Plaintiffs

**UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

LYMS, INC.; WENDY YOUNGREN AND ) Case No. 08-cv-1210-JLS-NLS  
CATHY MEANS AS SUCCESSOR TRUSTEES ) FIRST AMENDED COMPLAINT FOR  
OF THE LYMOS 401(k) SAVINGS PLAN, ) BREACHES OF FIDUCIARY DUTY UNDER  
Plaintiffs, ) THE EMPLOYEE RETIREMENT INCOME  
vs. ) SECURITY ACT ("ERISA "), 29 U.S.C. §1001  
BRUCE MILLIMAKI AND MICHAEL ) et seq.; NEGLIGENCE AND BREACH OF  
EGGERT, FORMER TRUSTEES OF THE ) CONTRACT UNDER 29 USC § 1367(a)  
LYMOS 401(k) SAVINGS PLAN; GARY )  
BERMAN, INDIVIDUALLY, )  
Defendants )  
JUDGE: Honorable Janis L. Sammartino

**SERVICE VIA CERTIFIED MAIL:**

THE SECRETARY OF THE UNITED STATES DEPARTMENT OF LABOR AND THE INTERNAL  
REVENUE SERVICE AS REQUIRED UNDER ERISA, 29 U.S.C. §1132(h).

1 Plaintiffs LYMS, Inc. (the "Plan Sponsor") and Wendy Youngren and Cathy Means, Successor  
2 Trustees of the LYMOS 401(k) Savings Plan (the "Successor Trustees" and the "Plan",  
3 respectively), hereby allege:

4 **PARTIES AND PRELIMINARIES**

5 1. The Plan Sponsor, LYMS, Inc., is a California corporation organized and existing under  
6 the laws of the State of California with its principal place of business located in the County of  
7 San Diego. It provides accounting and related services together with its affiliated company,  
8 Lipsey, Youngren, Means Ogren & Sandberg LLP.

9 2. The Successor Trustees, Wendy Youngren and Cathy Means, are certified public  
10 accountants residing and working in the County of San Diego.

11 3. The Plan is an employee pension benefit plan as defined under ERISA, 29 U.S.C. §  
12 1002(2). The Plan provides retirement benefits to the employees of the Plan Sponsor and its  
13 related company.

14 4. Bruce Millimaki ("Millimaki") is a certified public accountant residing and working in  
15 the County of San Diego.

16 5. Michael Eggert ("Eggert") is a certified public accountant residing and working in the  
17 County of San Diego.

18 6. Gary Berman ("Berman"), doing business as L & S Pension Services, is a third party  
19 administrator working in San Diego County. Mr. Berman previously provided administrative  
20 services to the Plan Sponsor for operation of the Plan.

21 **JURISDICTION AND VENUE**

22 7. The jurisdiction of this court over the subject matter of this action is predicated on 28  
23 USC § 1331. This action brings breach of fiduciary duty claims arising under 29 U.S.C.  
24 §1132(a)(2) for relief under 29 U.S.C. §1109 and claims under 29 U.S.C. §1132(a)(3) for  
25 equitable relief concerning defendants' mismanagement of a qualified retirement plan under the  
26 Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001 et seq. ("ERISA"). This  
27 Court has exclusive subject matter jurisdiction over these claims pursuant to 29 U.S.C.  
28 §1132(e)(1).

29 8. This complaint also brings supplemental state law negligence and breach of contract  
30 claims against defendant Berman under 28 U.S.C. §1367(a).

1       9.     Venue is proper in this court district under 29 U.S.C. §1132(e)(2) because the Plan is  
2 administered here and all of the defendants reside and work in San Diego county.

3

#### 4                   FACTUAL BACKGROUND

5                   The Company and Its Predecessors

6       10.    In approximately 1991, Millimaki joined Robert Lipsey ("Lipsey"), a certified Public  
7 Accountant and founding member of a firm then known as Robert Lipsey & Company  
8 ("RL&C"). RL&C engaged in the business of public accounting, with its headquarters and  
9 principal place of business in San Diego County.

10      11.    In or about 1992, RL&C became a professional corporation, Robert Lipsey & Co., Inc.  
11 The professional corporation has been renamed and reorganized over time resulting in its present  
12 form as LYMS, Inc. (the "Plan Sponsor"). The affiliated company, formed in or about 2001, was  
13 then known as Lipsey, Millimaki & Company, CPAs LLP and is now known as Lipsey,  
14 Youngren, Means, Ogren & Sandberg, LLP ("LYMOS"). LYMS, Inc. and LYMOS together  
15 constitute the "Company".

16      12.    From approximately 1991 through June 30, 2005, Lipsey and Millimaki were partners or  
17 shareholders in the Company and its predecessors. During the existence of those firms, Lipsey  
18 and Millimaki practiced accounting together for approximately 15 years.

19      13. In or about December 2004, Millimaki and Eggert, a professional employee of the  
20 Company, advised Lipsey that they desired to disassociate from the Company. By July 2005,  
21 Millimaki, Eggert and a number of other Company employees had moved out of the Company's  
22 offices and begun work with Millimaki Eggert LLP ("M&E"), a competing accounting firm  
23 formed by Millimaki and Eggert.

24      14.    The circumstances surrounding the breakup of the Company and the departure of  
25 Millimaki and Eggert ultimately lead to the discovery of facts that form the basis of the claims  
26 for relief in this action, as well as two state court proceedings consolidated as one action:  
27 *Millimaki v. Lipsey et al*, and *Lipsey v. Millimaki et al*, San Diego Superior Court case No. GIC  
28 849308/860755 (2006)(the "Dissolution Cases").

29      //

30      //

### **The Plan and Its Predecessors**

15. Since October 1, 1991, the Company and its predecessors have sponsored a tax-exempt qualified employee retirement plan (the "Plan") in which certain employees of the Company and its predecessors were eligible to participate. The Plan is currently known as the LYMOS 401(k) Savings Plan.

## **Milimaki and Eggert's Failure to comply with ERISA's Fiduciary Standards**

16. During the period from October 1991 through June 2005, Millimaki assumed sole fiduciary responsibility for the operation and administration of the Plan on behalf of the Plan Sponsor. Millimaki handled all of the responsibilities of the ERISA (Employee Retirement Income Security Act of 1974, as amended) plan administrator<sup>1</sup>, supervising all administrative matters related to the operation of the Plan. Millimaki retained the services of Gary Berman of L & S Pension Services to act as the contract administrator for the Plan and to assist Millimaki in his role as the ERISA Plan Administrator.

17. Millimaki was a Plan trustee from the adoption date of the Plan. Eggert was a trustee from December 9, 1998 until both Millimaki and Eggert were removed in 2005, and in this capacity, they were responsible for the management and disposition of the Plan's assets.

18. Cathy Means and Wendy Youngren were appointed as Successor Trustees effective July 1, 2005.

## **Millimaki's and Eggert's Refusal to Step Down As Plan Trustees**

19. As is common in business dissolutions, the parties disagreed on the value of the Company interest held by Millimaki. Attempts to resolve the various disputes by settlement failed, leading to the filing of the Dissolution Cases.

20. Millimaki and Eggert left the Company on June 30, 2005. In early July of 2005, Eggert informed the Company that no other trustees would be allowed to act on behalf of the Plan until he and Millimaki had disbursed all the funds from the Plan (at some unspecified future time).

<sup>1</sup> As defined under ERISA §3 (16)(A), 29 U.S.C. §1002 (16)(A).

1 Millimaki and Eggert continued to act as Plan trustees for more than six months after leaving the  
2 Company. During this time, Millimaki and Eggert filed Forms 5500 for the Plan (required  
3 information returns), made unauthorized distributions of money from accounts of the Plan to  
4 themselves and their Plan, and filed Forms 1099R for the Plan.

5 21. On July 21, 2005, the Company gave Millimaki and Eggert written notice that they  
6 were terminated as trustees of the Plan effective as of thirty days after receipt of the notice. The  
7 termination notice specified that Millimaki and Eggert were required to return all Plan  
8 documents and records and to provide the Successor Trustees with a final trust accounting of the  
9 Plan assets (as required by ERISA and the Plan document).

10 22. Notwithstanding the written termination notice, Millimaki and Eggert consistently failed  
11 and refused to step aside as trustees of the Plan. Instead, Millimaki and Eggert continued to  
12 purport to act as trustees of the Plan until sometime in 2006. Moreover, as alleged in more detail  
13 below, Millimaki and Eggert refused to turn over the Plan's records and documents or to provide  
14 the required accounting to the Plan's Successor Trustees, thereby hindering the Successor  
15 Trustees in the performance of their duties.

16 23. Millimaki's and Eggert's above-described conduct reflects their intentional disregard of  
17 the fiduciary and other duties imposed upon them as trustees of the Plan, their repudiation of the  
18 Plan's governing documents, and their willful refusal to provide Plan accounting and other  
19 information as required under ERISA.

20 24. Throughout settlement negotiations for the Dissolution Cases, Millimaki expressly and  
21 implicitly stated that he was in possession of accounting records and other documents covering  
22 his approximately 15 years as the Plan Administrator and a trustee of the Plan. Neither the  
23 Successor Trustees nor the Company had any knowledge or information indicating that  
24 Millimaki, Eggert, and Berman **did not**, in fact, have complete or adequate accounting records or  
25 other documentation concerning the Plan.

26 25. Under a proposed settlement agreement in the Dissolution Cases, Millimaki and Eggert  
27 agreed to cease purporting to act on behalf of the Plan, and to notify any affected third parties  
28

1 that they were no longer Plan trustees. The proposed agreement also required Millimaki and  
2 Eggert to deliver, on or before March 13, 2006, all accounting records and other documents  
3 concerning the Plan that they had obtained in their capacity as trustees of the Plan.  
4

5 26. On March 13, 2006, Millimaki and Eggert again failed to deliver the necessary Plan  
6 records, providing only a small package of brokerage statements. At the time, Millimaki and  
7 Eggert claimed not to have any other records pertaining to the Plan, an assertion that was not  
8 only inconceivable in light of their long tenure as trustees, but also inconsistent with their prior  
9 statements and continuing purported actions on behalf of the Plan.

10 27. As a result, the Successor Trustees and the Company insisted that Millimaki and Eggert  
11 produce all of the Plan records and documents and declined to execute the proposed settlement  
12 agreement until Millimaki and Eggert did so. In response, Millimaki and Eggert claimed that  
13 they had left the remaining Plan records in the Company's offices upon their departure, that the  
14 Company or its personnel must have lost the documents, and that the only Plan-related  
15 documents in their possession consisted of a small number of investment brokerage statements.  
16

17 28. Some time later, Millimaki and Eggert, through Berman, finally produced partial  
18 accounting records for the Plan. Those records were incomplete and full of errors and  
19 inaccuracies. Among other inadequacies, the trust accounting prepared by Berman and used to  
20 prepare the Forms 5500 for the Plan had inconsistent ending and beginning balances from year to  
21 year.  
22

23 29. It soon became evident why Millimaki and Eggert had refused either to step down as Plan  
24 trustees or to provide any records or documents concerning the Plan: the mismanagement of and  
25 potential problems with the Plan. The Plan Sponsor then realized that the potential costs and  
26 liabilities to the Plan and to the Company as a result of the former trustees' were unquantifiable,  
27 might be extreme, and would certainly affect the value of the firm at the time of his departure,  
28 which was a key variable in any settlement discussions. As a result, the parties did not reach any  
29 binding, written agreement to settle the Dissolution Cases.  
30

30 30. Eventually, Millimaki filed a motion for the appointment of a receiver or the issuance of

1 an injunction. The state court declined to grant the motion, conditioned upon the Company's  
2 agreement to deposit \$230,000 into a court-supervised escrow account pending the outcome of  
3 the Dissolution Cases, to be disbursed on further order of the state court. To date, the state court  
4 has approved the distribution of \$190,000 to Millimaki and retains the sum of \$40,000 in an  
5 interest bearing escrow pending resolution of the ERISA claims. In addition, the court  
6 determined that all issues in the case, other than the parties' respective ERISA rights and  
7 remedies, were resolved and dismissed. By order dated January 5, 2007 the court permitted  
8 Millimaki to retain the \$190,000, without prejudice to the rights of the Successor Trustees, the  
9 Company, and the Plan to seek repayment of those funds in connection with their ERISA claims  
10 for mismanagement of the Plan by Millimaki and Eggert.

### 13                   **Discovery of Plan Irregularities**

15         31. During and after the settlement negotiations described above, the Company and the  
16 Plan's Successor Trustees attempted to evaluate the status of the Plan, its accounting records, and  
17 its compliance with applicable laws and regulations. Toward that end, the Company engaged  
18 separate consultants and legal advisors with expertise in qualified retirement plans.

19         32. The Plan's Successor Trustees, as well as the advisors and attorneys hired by the  
20 Company, were hampered in their efforts to investigate the status of the Plan by Millimaki's and  
21 Eggert's continuing refusal to turn over the Plan's trust accounting records and other documents.  
22 After the collapse of settlement negotiations, however, Millimaki, Eggert, and Berman finally  
23 began to provide some of the requested documents.

25         33. Subsequent review of those documents by the Plan's Successor Trustees and their  
26 advisors revealed that a number of compliance failures and other irregularities occurred during  
27 Millimaki's and Eggert's tenures as former trustees of the Plan. Those shortcomings include, but  
28 are not necessarily limited to, the following:

- 30                   (a) Failure to amend the Plan properly for legal requirements necessary to

1 maintain the tax-qualification of the Plan;

2 (b) Refusal to relinquish control of the Plan assets following their removal as  
3 trustees;

4 (c) Refusal to provide the Successor Trustees with Plan documents and  
5 records and refusal to cooperate in good faith with the Successor Trustees, all in violation of  
6 their ERISA fiduciary responsibilities;

7 (d) Failure properly to account for the Plan's assets, and failure to either adopt  
8 or implement an ERISA Investment Policy Statement or to obtain professional investment  
9 advice sufficient to comply with their fiduciary responsibilities under ERISA (*see, e.g.*, 29 CFR  
10 §2509.94-2).

11 (e) Approval of a "rollover transaction" involving a Plan participant, the  
12 source, origin and amount of which have been unverifiable, leading the Trustees to conclude that  
13 this "rollover" may not constitute a qualified rollover and may, because of the facts involved,  
14 constitute an abusive tax avoidance transaction.

15 34. In connection with the acts and omissions described above, Millimaki and Eggert  
16 engaged in conduct that constitutes, at a minimum, gross mismanagement of the Plan and may  
17 reflect intentional wrongdoing. Moreover, Millimaki and Eggert's conduct related to these Plan  
18 matters was facilitated by Berman's negligence and breach of contract in his role as contract  
19 administrator<sup>2</sup>.

#### 20 The VCP Submission

21 35. In the meantime, the Company, the Plan, and the Successor Trustees continued working  
22 with their ERISA consultants and attorneys to finalize and file a voluntary compliance program

---

23 27 <sup>2</sup> Plaintiffs subsequently learned that although Millimaki described Berman as the Plan's "administrator",  
24 Millimaki, on behalf of the Company, paid Berman no fees in this capacity. Plaintiffs also learned that  
25 the compensation arrangement between Millimaki and Berman was that Millimaki would refer clients to  
26 Berman in exchange for advice from Berman.

1 ("VCP") submission to the Internal Revenue Service ("IRS"). The VCP program set forth in  
2 Rev. Proc. 2006-07, provides plan sponsors with the opportunity to correct operational plan  
3 defects, including the types of defects created by Millimaki's, Eggert's, and Berman's  
4 mismanagement of the Plan.

5 36. As detailed below, the VCP submission involved substantial costs paid by the Company  
6 on behalf of the Plan, and a significant investment of unpaid time by the Company's personnel.  
7 The questionable rollover transaction (discussed in more detail below) is *not* remediable under  
8 the VCP program, and thus exposes the Plan – as well as the Company – to future audit problems  
9 and substantial potential liability.

10

11 **The IRS Compliance Statement and Corrective Action Requirements**

12 37. After extended review of the VCP submission, the IRS identified a number of serious  
13 problems resulting from Millimaki's, Eggert's, and Berman's mismanagement of the Plan.  
14 These problems, which involve violations of a number of provisions of the Internal Revenue  
15 Code, as well as the terms of the Plan itself, include:

16 (a) Failing to provide documents correctly identifying the employer under the  
17 Plan (which originally triggered the need for the VCP submission);

18 (b) Allowing ineligible employees – *including Millimaki's own wife* – to  
19 participate in the Plan;

20 (c) Failing to meet contribution testing requirements governing highly  
21 compensated employees in *all five years tested* (1997 through 2001), resulting in excess  
22 contributions totaling \$22,220.80 for the years in question, and requiring the Company to make  
23 an additional contribution in that amount for its non-highly-compensated employees within 150  
24 days of receipt of the VCP; and

25 (d) Allowing plan participants to exceed maximum income deferral levels for  
26 the years 1996 through 2001.

27 38. The IRS issued a Compliance Statement on August 5, 2007 conditioning the ongoing tax-

1 qualification of the Plan upon a complete restatement of Plan documents as well as the  
2 completion of certain corrective actions and payments.  
3

4 **The Questionable Rollover Transaction**

5 39. The VCP Compliance Statement also includes language to the effect that it may not be  
6 relied upon by the Plan or the Plan Sponsor for the purpose of asserting that they were not parties  
7 to an abusive tax avoidance transaction. In the VCP submission, the Company was obligated to  
8 disclose to the IRS a transaction for which a Form 1099R was issued in 2005 by Millimaki to a  
9 former Plan participant (a partner in the Company), for which neither the Plan's former trustees,  
10 Millimaki and Eggert, nor the Plan's prior third party administrator, Berman, ever produced  
11 relevant records. This transaction involved a substantial amount of money, possible tax  
12 avoidance by the former employee, and potential tax liabilities to the Plan (all of which would  
13 become liabilities of the Company) if the facts are finally uncovered by a future IRS audit.  
14 Therefore, the Plan remains encumbered by significant potential claims and contingent liabilities.  
15 Moreover, to the extent any such contingent liabilities become actual obligations, they will  
16 automatically accrue to the Company, as the Plan's Sponsor.

17 **Summary of Damages**

18 40. As of October 31, 2007, the Company, on behalf of the Plan, had incurred and paid  
19 significant professional fees and related costs in analyzing, reporting, and attempting to rectify  
20 legal and accounting deficiencies in the Plan resulting from Millimaki's, Eggert's, and Berman's  
21 above-described acts and omissions. These expenses include legal fees, retirement plan  
22 consulting charges, and the costs of preparing the VCP submission and remedying the failures as  
23 required under the IRS Compliance Statement.

24 41. In addition, the Company is obligated to contribute an additional \$22,220.80 to the Plan  
25 on behalf of lower-compensated employees to equalize the excess contributions by highly  
26 compensated individuals for the years 1997 to 2001.

27 42. Finally, the Company, on behalf of the Plan, expects to incur additional professional fees  
28

1 to complete the correction of all Plan deficiencies identified and required under the Compliance  
 2 Statement. The total cost to the Plan and the Company is estimated to be a minimum of  
 3 \$325,000.

4 **CLAIMS FOR RELIEF**

5 **First Claim For Breach of Fiduciary Duty under 29 U.S.C. § 1132 (a)(2) for appropriate  
 6 relief under 29 U.S.C. § 1109**

7 43. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.  
 8 44. ERISA imposes a prudent man standard upon fiduciaries in their operation and  
 9 administration of a qualified retirement Plan. ERISA imposes certain remedies for any failure to  
 10 comply with these fiduciary duties, including relief under 29 U.S.C. §1132(a)(2): (a) Any  
 11 person who is a fiduciary with respect to a plan who breaches any of the responsibilities,  
 12 obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to  
 13 make good to such plan any losses to the plan resulting from each such breach, and to restore to  
 14 such plan any profits of such fiduciary which have been made through use of assets of the plan  
 15 by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may  
 16 deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a  
 17 violation of section 1111 of this title.

18 48. Millimaki, as trustee, failed to adopt and implement an ERISA required Investment  
 19 Policy Statement, or, at a minimum, to seek professional investment advice concerning the  
 20 proper investment of the Plan's assets. This failure subjected the Plan to a loss of earnings, to be  
 21 demonstrated according to proof. Under ERISA, Millimaki is required personally to make good  
 22 any such losses to the Plan.

23 49. Eggert, as Millimaki's co-trustee, had an obligation to take action concerning these  
 24 investment issues when he realized that Millimaki had failed or refused to do so. Millimaki is  
 25 equally personally liable under ERISA §405, 29 U.S.C. §1105 for his failure to act, and should  
 26 also be require to make good any losses to the Plan occasioned by this failure.

27 49. Millimaki and Eggert likewise failed to provide appropriate investment options for the  
 28 self direction of the participants' 401(k) deferral accounts as required under ERISA §404(c).  
 29 Accordingly, any participant losses to the Plan may be recoverable as the fiduciary protections of

1 §404(c) did not apply. See, e.g., *Larue v. Dewolff, Boberg & Associates, Inc. et al.*, 128 S. Ct.  
2 1020 (2008) (Sections 409 and 502(a)(2) authorize a participant in a defined contribution  
3 pension plan to sue to recover losses to the plan caused by a fiduciary breach even though the  
4 losses will be allocated to the participant's individual account).

5 **Second Claim For Breach of Fiduciary Duty under 29 U.S.C. §1132(a)(3)**

6 50. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.  
7 51. As Plan Administrator, Millimaki owed the Plan and its predecessors, the Company and its  
8 predecessors (as the Plan's sponsors), and the Plan's participants strict fiduciary duties of trust,  
9 loyalty, and due care. More specifically, the Plan, the Company, and the Company employees  
10 who were participants in the Plan entrusted Millimaki with responsibility for (1) diligently  
11 administering the Plan to ensure its compliance with all applicable tax regulations and other  
12 requirements, (3) accurately reporting the Plan's activities to the appropriate regulatory  
13 authorities, and (4) fully accounting for the Plan's assets to all interested parties, including the  
14 Plan's beneficiaries. As a result of the operational defects that arose from Millimaki's failure to  
15 manage and administer the Plan in accordance with ERISA, the Company has advanced  
16 significant VCP fees, legal fees and other correction expenses on behalf of the Plan, both before  
17 and after the issuance of the VCP Compliance Statement. The Company seeks to recover these  
18 expenses from Millimaki and Eggert. Most of the fees and expenses sought are properly  
19 expenses of the Plan itself. The Plan document in effect when all of these problems occurred  
20 states as follows about payment of expenses from the Plan:  
21  
22 “All expenses of administration may be paid out of the Trust Fund unless paid by the Employer.  
23 Such expenses shall include any expenses incident to the functioning of the Administrator, or  
24 any person or persons retained or appointed by any Named Fiduciary incident to the exercise of  
25 their duties under the Plan, including, but not limited to, fees of accountants, counsel, investment  
26 managers, agents (including nonfiduciary agents) appointed for the purpose of assisting the  
27 Administrator or Trustee in carrying out the instructions of Participants as to the directed  
28 investment of their accounts (if permitted) and other specialists and their agents, the costs of any  
29  
30

1 bonds required pursuant to Act Section 412 and other costs of administering the Plan. Until paid,  
 2 the expenses shall constitute a liability of the Trust Fund."

3 52. Under ERISA a fiduciary may bring a claim to enforce and redress ERISA's provisions,  
 4 and to obtain appropriate equitable relief. 29 U.S.C. §1132(a)(3). See, e.g., *Waller v. Blue*  
 5 *Cross*, 32 F.3d 1337, 1339 (9<sup>th</sup> Cir. 1994).

6 **Third Claim for Negligence against Defendant Berman under 28 U.S.C. §1367(a)**

7 53. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

8 54. At all times relevant to this dispute, Berman was obligated by virtue of his status as the  
 9 contract administrator of the Plan to exercise due care and reasonable diligence providing  
 10 services for the administration of the Plan, including preparation and maintenance of the Plan's  
 11 documents, records, and data.

12 55. Berman breached his duties of due care and reasonable diligence. More specifically,  
 13 Berman maintained incomplete records, prepared and filed erroneous information returns with  
 14 the IRS for most years, participated in questionable rollover transaction that could cause  
 15 unreported tax liabilities for the Plan and other potential adverse consequences.

16 As a direct result and proximate result of Berman's failure to exercise due care and reasonable  
 17 diligence, the Company and the Plan have suffered damages in an amount to be proven, plus  
 18 interest on those damages at the maximum legal rate.

19 **Fourth Claim for Breach of Contract against Defendant Berman under 28 U.S.C. §1367(a)**

20 56. Plaintiffs hereby incorporate the allegations included in paragraphs 16 through 42.

21 57. Berman agreed to provide and did provide third party administration services to the Plan and  
 22 the Former Trustees. Berman breached his obligations under the agreement by, among other  
 23 things, preparing defective Plan documents and otherwise failing to perform the services  
 24 standard in his industry.

25 **REQUEST FOR RELIEF**

26 Plaintiffs, the Successor Trustees and the Company, hereby request the following relief:

27 1. An order imposing a constructive trust on the \$190,000 conditional payment to  
 28 Millimaki;

29 //

2. An order releasing the \$40,000 in escrow to the Company as reimbursement for the Plan expenses it has paid in correcting the operational defects and other costs associated with Millimaki and Eggert's breaches of fiduciary duty;

3. An order requiring Millimaki to restore to the Plan lost profits resulting from his failure to comply with his investment fiduciary duties;

4. An order requiring Millimaki and Eggert personally to make the Plan whole to the extent not otherwise achieved, including any future, but presently unknown losses to the Plan arising out of their tenure as Former Trustees;

5. An order under California law awarding the Company damages for Berman's negligence and breach of contract;

6. An order for attorneys' fees and costs under ERISA, 29 U.S.C. §1132 (f); and

7. For such further order as the court deems appropriate.

Dated this 15<sup>th</sup> day of July, 2008

**BRANTON & WILSON.**

APG

By: Peta L. Hallisey  
PETA LEWIS HALLISEY